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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2959-11T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES P. KUCINSKI,

Defendant-Appellant.

Submitted March 24, 2015 - Decided October 19, 2015

Before Judges Fisher, Accurso and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 08-07-1188.

Joseph E. Krakora, Public Defender, attorney for appellant (Rochelle Watson, Assistant Deputy Public Defender, of counsel and on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Nancy A. Hulett, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant, James P. Kucinski, appeals from his conviction after a trial by jury. On appeal, defendant argues he was denied his right to a fair trial based upon the prosecutor's improper cross-examination relating to his silence and lack of details provided to the police during his post-arrest

interrogation. We conclude after a review of the record and after application of controlling decisions of law, that the prosecutor's line of questioning was improper and violated defendant's constitutional right against self-incrimination. We reverse and remand.

Defendant and his brother John had a strained relationship. John resided with their mother, Anna, serving as her caretaker as her health deteriorated. The brothers' relationship was so tense that a family friend, Ralph, acted as a go-between providing information to defendant about Anna's health.

Anna was hospitalized in April 2008. Defendant went to visit Anna and discovered that she was not at home but at the hospital. When defendant arrived at the hospital, John and their oldest brother, Stephen, were already there. John and defendant engaged in a physical altercation which continued even after a nurse pulled John away from defendant.

Ralph informed defendant that Anna was discharged from the rehabilitation center and sent home. Defendant became angry that he was unable to speak to Anna directly and that no family member was returning his calls. Defendant told Ralph, "You better get your suit ready. I have two brothers that belong in the cemetery"

On April 30, 2008, defendant was angered after a phone call with John. John told defendant not to come to the house and if

he did, John would kill him. Defendant left his house, telling his girlfriend he was going to see his mother. Defendant did not expect John would be at home. Upon defendant's arrival, John was fixing a leaf blower in the driveway. John asked defendant where he was going and told defendant he could not go inside. John pushed defendant and hit him in the face. The two began fighting. John stabbed defendant in the left arm with a screwdriver. John also bit defendant's hand. Both defendant and John grabbed bricks and swung them at each other. Defendant hit John in the face and left the residence.¹ A neighbor later found John lying on his stomach in the driveway, surrounded by blood-stained bricks.

When defendant returned to his residence, his clothes were blood-stained. Defendant told his live-in girlfriend, "I did John." After defendant changed his clothes, he left. Defendant was arrested later that night while in his parked car near his residence. Officers noted that defendant did not say anything and seemed "indifferent." At the time of his arrest, the officers observed defendant had abrasions on his head and hands and his sweatshirt was blood-stained.

¹ At trial, a medical doctor testified on behalf of the State as to the cause of death. The doctor testified there were multiple causes of death, resulting from twenty-two impacts to the head of which fourteen contributed to brain injuries.

Following his arrest, defendant was transported to police headquarters where he was interrogated after being advised of his Miranda rights and waiving them.² During the interrogation defendant did not provide any details about the driveway fight with John, but repeatedly mentioned the fight he had with John at the hospital in early April and that John was going to kill him or shoot him with guns in Anna's house. The interview was concluded when defendant requested a lawyer. After being left alone for eighty minutes, defendant was advised by one of the interrogating officers that he was being charged with murder. Defendant asked if he could talk. Defendant was re-administered his rights which he again waived.

Upon the resumption of the interrogation, defendant's answers to the questions were largely non-responsive and non-committal. For example, upon being asked about the driveway fight, defendant responded, "I don't know. I'm not sure what happened." When asked how he got the cuts on his arms and hands defendant said, "Who knows? Him biting me. Yeah we had a confrontation but he was biting me." When asked what John did that caused defendant to defend himself, defendant responded, "it don't matter." The officers asked defendant how he could say he did not know if John had been hit with bricks and

² See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

defendant said, "I really can't talk about stuff like that." Defendant told the officers, "put me down as a murderer. I'm gonna go down."

Defendant was charged with first-degree murder, N.J.S.A. 2C:11-3a(1) or (2) and third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d). Prior to trial, the court ruled in a Miranda motion hearing that defendant's statements were admissible. Trial commenced before a jury on September 27, 2011. At trial, defendant testified on his own behalf. The prosecutor cross-examined defendant about his failure to offer a detailed account of the incident to the police during his interrogation.³

Q: Did you tell the detectives that you got stabbed with a screwdriver into your muscle?

A: No. I didn't want to talk about that. They asked me about it. I didn't want to talk about it.

Q: So you defended yourself against this attack from John by a screwdriver and you don't want to tell the cops that?

.

Q: You're saying today, three-and-a-half years later, you don't want to tell the cops

³ During cross-examination, defense counsel lodged numerous objections to this line of questioning. The judge "duly noted" the objections, sustained the objections, held sidebar conferences and eventually entertained a motion for a mistrial by defendant.

that you got stabbed by a screwdriver by John?

A: I didn't want to talk about it. They asked me [what] other wounds I had on me and I just didn't want to talk about it.

. . . .

Q: When they asked you, "were any weapons used other than your hands and fists," you said what?

. . . .

A: I didn't want to talk about it. I didn't want to talk about what went on there, what he did and what I did.

Q: After being charged with murder, you didn't want to talk about it?

At that point, defense counsel objected and the trial judge sustained the objection. The cross-examination continued:

Q: Now, you gave us all kinds of details about what John was doing in the driveway and what occurred in the driveway, right, when you first got there, didn't you?

A: Yes.

Q: Walking up to the driveway towards John, John saying something, brushing by him and him starting to attack you with a screwdriver. Right?

A: No, he punched me.

Q: Punched you, and then the screwdriver comes out?

A: Later on.

Q: What did you say?

A: I said I don't know.

Q: That was on April 30, wasn't it?

A: Uh-huh.

Q: That was the day wasn't it?

A: Yes.

Q: I don't know.

A: I knew what he was doing, but I didn't really want to talk about anything like that.

Q: You didn't want to tell him back on April 30 after they tell you you're charged with murder that John is in the driveway?

. . . .

Q: You're telling us today that you wanted to tell the jury the details. It's important today. Right?

A: Yes.

Q: But it wasn't important to the cops?

After defense counsel objected, the judge conducted a sidebar conference. The judge stated the prosecutor was exceeding the boundaries of defense counsel's earlier objection. The judge noted his "fear" to the prosecutor "that you're causing this case to be reversed." The judge instructed what defendant "doesn't . . . tell the police" is not appropriate for cross-examination. Despite the instruction, the prosecutor continued to pursue the "doesn't tell the police" line of questioning.

Q: So back on April 30, you tell the police "we just had an argument," right?

A: Uh-huh.

Q: Today, you give all kinds of details ... about what happened in the driveway.

A: Once again, I didn't want to talk about it.

Q: After they charged you with murder, you didn't want to talk about it.

A: I didn't want to talk about it.

. . . .

Q: [During the interrogation] you say "I don't know," right? Back on April 30, the detective asked you what happened when you got there, and you say "I don't know," right?

A: Yes.

Q: Today you give us all kinds of detail of what happened when you got there, right?

A: I said I don't know. This way I wouldn't have to talk about it.

Defense counsel again objected. The objection was sustained. Defendant moved for a mistrial. The judge did not initially address the mistrial motion. Rather, the judge ruled the State could cross-examine defendant about express inconsistencies between what he told police and what he testified to at trial. However, the judge added any question prefaced with, "you did not say this," was improper. As such,

the judge ruled the State could not cross-examine defendant about non-statements.

The judge then denied defendant's motion for a mistrial but provided a limiting instruction to the jury that defendant had a right to remain silent and no inference of guilt could be drawn from it. During the final charge, the judge instructed the jury they must follow a limiting instruction provided by the court and then repeated the limiting instruction. The judge charged the jury that no inference of guilt from defendant's invocation of his right to remain silent was to be made and it could only be used to affect credibility.

Following six days of deliberations, the jury returned a verdict of guilty on the lesser-included offense of passion/provocation manslaughter. The judge merged the conviction for possession of a weapon for an unlawful purpose into the manslaughter conviction and sentenced defendant to a nine-year term of imprisonment, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

On appeal, defendant argues:

POINT I

OVER VEHEMENT OBJECTION, THE PROSECUTOR CROSS-EXAMINED DEFENDANT ON HIS FAILURE TO GIVE THE DETAILS OF HIS ACCOUNT OF SELF-DEFENSE IMMEDIATELY FOLLOWING HIS ARREST, PREJUDICING HIS RIGHT TO A FAIR TRIAL.

POINT II

THE COURT ERRED IN ADMITTING EVIDENCE THAT DEFENDANT WAS AN ALCOHOLIC FOR THE PURPOSES OF LEGITIMATING THE DECEDENT'S ANIMOSITY TOWARD DEFENDANT AND EXPLAINING WHY THE DECEDENT ASSAULTED DEFENDANT ONE MONTH BEFORE THE INCIDENT.

POINT III

A NINE-YEAR SENTENCE FOR A FIFTY-THREE YEAR OLD DEFENDANT WITH NO PRIOR INDICTABLE CONVICTIONS, AND WHO WAS FOUND TO HAVE ACTED UNDER PROVOCATION, IS MANIFESTLY EXCESSIVE.

We confine our decision to the first point raised by defendant on appeal. The scope of our review is de novo as it involves purely questions of law and the application of law to the facts of the case. State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div.), certif. denied, 182 N.J. 148 (2004); see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Generally, the scope of cross-examination is a matter addressed to the trial judge's discretion. State v. Murray, 240 N.J. Super. 378, 394 (App. Div.), certif. denied, 122 N.J. 334 (1990); see also State v. Silva, 131 N.J. 438, 444 (1993); State v. Petillo, 61 N.J. 165, 169 (1972), cert. denied, 410 U.S. 945, 93 S. Ct. 1393, 35 L. Ed. 2d 611 (1973); State v. Wormley, 305 N.J. Super. 57, 66 (App. Div.), certif. denied, 154 N.J. 607 (1998); State v. Sanchez, 224 N.J. Super. 231, 251 (App. Div.), certif. denied, 111 N.J. 653 (1988). Although counsel are

customarily afforded considerable latitude in cross-examining witnesses, that range is subject to limits reasonably imposed by the trial judge. State v. Spencer, 319 N.J. Super. 284, 302 (App. Div. 1999) (citing State v. Rose, 112 N.J. 454, 499 (1988)). "It is well-established that the scope of cross-examination is a matter for the control of the trial court and an appellate court will not interfere with such control unless clear error and prejudice are shown." Murray, supra, 240 N.J. Super. at 394.

A defendant has a constitutional right to remain silent. U.S. Const. amend. V; State v. Brown, 190 N.J. 144, 153 (2007). The State may not "impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest." Doyle v. Ohio, 426 U.S. 610, 611, 96 S. Ct. 2240, 2241, 49 L. Ed. 2d 91, 94 (1976) (footnote omitted). This is so because "every post-arrest silence is insolubly ambiguous" Id. at 617, 96 S. Ct. at 2244, 49 L. Ed. 2d at 97 (footnote omitted).

On the other hand, federal courts generally permit the use of pre-arrest silence to impeach a defendant. Jenkins v. Anderson, 447 U.S. 231, 238-39, 100 S. Ct. 2124, 2129, 65 L. Ed. 2d 86, 94-95 (1980). However, the Jenkins Court invited state courts to formulate their own "evidentiary rules defining the

situations in which silence is viewed as more probative than prejudicial." Id. at 240-41, 100 S. Ct. at 2130, 65 L. Ed. 2d at 96. Generally speaking, "our state-law privilege against self-incrimination is, if anything, more protective than the [F]ifth [A]mendment." State v. Strong, 110 N.J. 583, 595 (1988) (citations omitted).

New Jersey does not have a state constitutional equivalent to the Fifth Amendment. Rather, our "privilege against self-incrimination . . . is deeply rooted in this State's common law and codified in both statute and an evidence rule." State v. Muhammad, 182 N.J. 551, 567 (2005). N.J.S.A. 2A:84A-19 and its correlated evidence rule, N.J.R.E. 503, provide that "every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate"

Initially, the Supreme Court described this privilege expansively. "[W]hen a defendant expressly refuses to answer, no inference can be drawn against him under the doctrine of acquiescence by silence or any other concept." State v. Ripa, 45 N.J. 199, 204 (1965) (citations omitted). Further, no comment on his silence may be made to the jury. State v. Lanzo, 44 N.J. 560, 563 (1965) (citing Griffin v. State of California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)).

This being so, it should certainly follow that a defendant is under no obligation to volunteer to the authorities at the first opportunity the exculpatory story he later tells at his trial and cannot be penalized directly or indirectly if he does not. While the situation in Ripa was that of the State offering evidence of a refusal to answer as substantive proof of guilty [sic] on its own case, we think the result should be no different when it is presented by way of attempted impeachment of a defendant's exculpatory testimony through cross-examination, and we so hold as a matter of state law. The privilege of silence is substantially eroded and reliance upon it unjustifiably penalized in either situation.

[State v. Deatore, 70 N.J. 100, 115-16 (1976).]

The issue in Deatore was whether,

if a defendant . . . testifies exculpatory at trial and had not told that story, but remained silent, at or near the time of his arrest, his silence and failure to volunteer then, whether or not he was questioned, may properly be brought to the attention of the jury on cross-examination in order to permit the inference that the exculpatory testimony is therefore untrue.

[Id. at 108.]

The Court determined "that such cross-examination of a defendant is improper." Id. at 109. It rejected the federal distinction between silence before and silence after Miranda warnings as meaningless because "[t]he right to remain silent existed long before Miranda; that decision, for present purposes, required only that a defendant be reminded of it so

that he could make an appropriate choice before any interrogation." Id. at 117 n.10.

In Muhammad, supra, 182 N.J. at 558, the Court reaffirmed "that a suspect's silence while in custody, under interrogation, or 'at or near' the time of his arrest cannot be used against him in a criminal trial." There, after raping the victim, the defendant police officer took her to the police station and accused her of harassing his brother and sister-in-law. Id. at 559-60. The victim insisted that defendant raped her and produced the condom he used as evidence of the rape. Id. at 560. The defendant was taken into custody and made no more statements. Id. at 561.

The defendant did not testify at trial, but counsel offered an exculpatory version of the events surrounding the crime in question. Id. at 562. With respect to the prosecutor's arguments to the jury, the Court drew a sharp distinction between the prosecutor, on the one hand, pointing out the significant inconsistency between the officers' testimony respecting the defendant's statements at police headquarters and the purported exculpatory version of the events and, on the other hand, asking "the jury to reject the consent defense because defendant remained silent when he had the opportunity to present it to the police." Id. at 566 (footnote omitted).

[T]he right of . . . a suspect to remain silent when in police custody or under interrogation has always been a fundamental aspect of the privilege in this state. When in custody, a suspect is privileged to say nothing at all to the police and is under no duty to give a statement. [] The reason for a suspect's silence in a police dominated setting cannot easily be discerned. Because we cannot know whether a suspect is acquiescing to the truth of an accusation or merely asserting his privilege, such silence is equivocal. We have recognized that a likely explanation for a suspect's silence while under official interrogation or in custody may be that he is exercising his right to remain silent. Therefore, we do not permit a jury to infer guilt from that silence.

[Muhammad, supra, 182 N.J. at 567 (citations omitted) (internal quotation marks omitted).]

The Muhammad Court noted that federal courts permit the use of silence prior to Miranda warnings, but reasoned that under New Jersey law, "[b]arring the use of silence 'at or near' the time of arrest avoids the often murky inquiry into pinpointing the precise moment a suspect is placed in custody or under arrest." Id. at 568-69. The Court found that the facts before it "f[ell] squarely within the ambit of Deatore, supra, and [State v. Lyle, 73 N.J. 403 (1977)]." Muhammad, supra, 182 N.J. at 572.

Those references in which the prosecutor drew inferences of guilt from defendant's silence were patent violations of Deatore, supra, and Lyle, supra. Defendant was not obliged to give the police the exculpatory story his attorney presented

at trial, and the State was not permitted to use his silence to convict him. Because we conclude that the prosecutor's violation of defendant's state law privilege against self-incrimination was clearly capable of producing an unjust result, we are constrained to reverse defendant's conviction.

[Id. at 573-74 (footnote omitted) (citations omitted) (internal quotation marks omitted).]

Under different circumstances, the State may cross-examine a defendant on the differences between freely given post-Miranda statements and the testimony given at trial. See State v. Elkwisni, 190 N.J. 169, 178-79 (2007); State v. Tucker, 190 N.J. 183, 189-90 (2007). In Elkwisni, supra, for instance, the Court held, "once defendant testified concerning statements he made to the police after his arrest . . . the State may fairly cross-examine defendant concerning those statements[]" and offer rebuttal testimony. 190 N.J. at 172. However, it was improper for the State to comment on a defendant's silence at the time he or she is placed under arrest. Id. at 181. Nonetheless, the Court found that the limited questioning was "harmless and could not have affected the outcome of the case." Ibid. The Court then held that "the trial court should, at a minimum, instruct the jury that such evidence should be limited to assessing defendant's credibility and that it may not be used in determining whether defendant is guilty or not guilty." Id. at 182.

In State v. Stas, 212 N.J. 37, 53-58 (2012) (citations omitted), the Court engaged in a detailed synopsis of the above line of cases to summarize New Jersey's jurisprudence as follows:

Under federal law, the use for any purpose at trial of a defendant's silence after his arrest and the administration of Miranda warnings violates his or her privilege against self-incrimination and his or her right to due process. Under this Court's jurisprudence, even silence that precedes the administration of Miranda warnings – if it is "at or near" the time of a defendant's arrest—cannot be used for any purpose at trial. However, our case law teaches that pre-arrest silence that is not "at or near" the time of arrest, when there is no government compulsion and the objective circumstances demonstrate that a reasonable person in a defendant's position would have acted differently, can be used to impeach that defendant's credibility with an appropriate limiting instruction. It cannot, however, be used as substantive evidence of a defendant's guilt.

[Id. at 58 (citations omitted).]

Here, during the interrogation defendant did not provide details about the murder. At trial, defendant testified in detail and recounted the sequence of events on the day of the incident. At the conclusion of defendant's direct examination, the judge and counsel engaged in an extended colloquy relative to the admissibility of the statement. Defense counsel sought to preempt any reference to the statement during cross-examination. The prosecutor argued the defendant never clearly

invoked his right to remain silent so the statement was "free game." Over defendant's objection, the judge permitted the statement to be used to impeach defendant's credibility but instructed the prosecutor to proceed with caution. The judge instructed the prosecutor that he could not impeach defendant on grounds that he failed to offer an account of events during the police interrogation following his arrest. Despite this instruction, the prosecutor cross-examined defendant on his failure to offer a detailed account of the incident to the police.

The form of the prosecutor's questions, i.e., "[D]id you tell the detectives?" and "[Y]ou don't want to tell the cops that?" were intended to focus the jurors on defendant's "silence." A review of the trial record evinces that despite sustained objections, a motion for a mistrial and a cautionary instruction, the prosecutor was undeterred in his quest to elicit objectionable testimony. When reminded by the judge during the argument on the mistrial motion that the line and form of questioning was improper, the prosecutor remained steadfast that his position on the applicable law was the correct one.

When considering the constitutional underpinnings, specifically, the right against self-incrimination, we conclude the error was not harmless beyond a reasonable doubt. State v.

Castagna, 187 N.J. 293, 312 (2006) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710-11 (1967))).

In reaching our determination, we recognize that "curative" instructions were provided to the jurors. As our Supreme Court noted, even in the context of a constitutional error, a curative instruction will not be deemed inadequate unless there is a real possibility that the error led the jury to a result it otherwise might not have reached. State v. Winter, 96 N.J. 640, 647 (1984); State v. Macon, 57 N.J. 325, 335 (1971). We also recognize that when weighing the effectiveness of curative instructions, a reviewing court should give equal deference to the determination of the trial court. Winter, supra, 96 N.J. at 648.

In Winter, the defendant, a registered nurse, was indicted for aggravated manslaughter arising out of the death of a patient. Id. at 643. During the trial, the State called as a rebuttal witness the acting New Jersey Medical Examiner. Ibid. On cross-examination, the Medical Examiner referenced an alleged declaration of the decedent that had been ruled inadmissible. Id. at 643-44. Immediately following the offending testimony, the judge, without objection by defense counsel, struck the

answer of the witness. Id. at 644. Defense counsel moved for a mistrial which was heard and denied outside the presence of the jury. When the jurors returned, the trial judge instructed the jury "most emphatically" to ignore the remark and then asked the jurors to acknowledge their understanding and their ability to comply with the instruction. Id. at 644, 649. The Court noted that in the "face of the trial court's sharp and complete curative instruction" the mark made by the testimony was not indelible. Id. at 649. The Court held that any prejudice caused by the testimony of "clearly inadmissible statements" was remedied by the "specific, forceful" instruction given to the jury. Id. at 643.

In this case, the judge did not strike, immediately or at any time, the objectionable questions and answers. The judge, despite "duly noting" and sustaining defense counsel's objections, advised the jurors that he would instruct them when "the examination of this witness and reexamination is done on how to receive this evidence." Notwithstanding, the instruction was given prior to the testimony's conclusion after the defendant's motion for a mistrial and its denial. Even when given, the instruction was substantively erroneous. When the trial resumed five days later, the judge, realizing the error in the instruction, provided a supplemental instruction which also was erroneous. In both instructions, the judge failed to advise


the jurors that no inference of defendant's guilt or credibility should be drawn from the exercise of his right to remain silent.

In State v. Vallejo, the Court stated that it "has consistently stressed the importance of immediacy and specificity when trial judges provide curative instructions to alleviate potential prejudice to a defendant from inadmissible evidence that has seeped into a trial." 198 N.J. 122, 135 (2009) (citations omitted). The Court noted that "generally, for an instruction to pass muster . . . it must be firm, clear and accomplished without delay." Ibid. (citation omitted).

Here, the timing and content of the instruction combined with the judge's failure to forcefully address the prosecutor's conduct prior to the instruction allowed the jurors to be repeatedly exposed to inadmissible questions and resultant answers. Since the tragic altercation between defendant and his brother was unwitnessed by any third party, defendant's out-of-court statement and its utilization by the State during the trial played a significant role. Given that significance, we can have no confidence in the trial's outcome.

Reversed and remanded for a new trial.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION